

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
Case No. 24-12480 (JTD)
FRANCHISE GROUP, INC.,
et al., (Jointly Administered)
Courtroom No. 3
824 North Market Street
Debtors. Wilmington, Delaware 19801
Thursday, November 21, 2024
4:39 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOHN T. DORSEY
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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Agenda

Item 1: Notice of Filing Proposed Second Interim Order 4
(I) Authorizing the Debtors to Pay Certain
Prepetition Claims of Certain Critical
Vendors, Foreign Vendors, Shippers & Logistics
Providers, and 503(b)(9) Claimants; and (II)
Granting Related Relief [D.I. 176, 11/14/24]

Court's Ruling: 33

Transcriptionists' Certificate 36

1 (Proceedings commenced at 4:39 p.m.)

2 THE COURT: Good afternoon, this is Judge Dorsey.
3 We're on the record in Franchise Group, Inc., Case Number 24-
4 12480.

5 Before we begin, I'll just put on the record that
6 we did a chambers conference this morning in this case where
7 I was looking to see if there was a consensual resolution to
8 the issues regarding the additional use of or the additional
9 payment of critical vendors. At that hearing -- at that
10 conference, it became clear that there was not a potential
11 resolution and that we were going to need to go forward with
12 a hearing on an expedited basis based on the representations
13 of the debtors that the funding was necessary so they can pay
14 these vendors by Friday without causing harm to the debtors'
15 assets. So, for those reasons, we are back on the record and
16 we'll go from there.

17 Ms. Sinclair, on behalf of the debtors?

18 MS. SINCLAIR: Yes, Your Honor.

19 For the record, Debra Sinclair, Willkie Farr &
20 Gallagher, for the debtors.

21 Your Honor, as you noted, the only agenda item
22 today is our proposed second interim order authorizing
23 certain payments to critical and foreign vendors, shippers
24 and logistics providers, and 503(b)(9) payments. We filed
25 that proposed second interim order last Thursday,

1 November 14th. The objection deadline was today at 4:00 p.m.

2 The ABL lenders, first lien lenders, and the U.S.
3 Trustee are all signed off on that proposed order. We've
4 received no written objections to the order, but as you
5 noted, the second lien HoldCo lenders are continuing to
6 contest our need for the interim critical vendor relief, at
7 least, in part. I'll give Your Honor the update on what's
8 transpired since our status conference this morning.

9 But first, for the benefit of everyone in court,
10 I'd like to quickly bring the Court up to speed on what's
11 transpired in this regard since the first day hearing. The
12 debtors originally requested an interim cap of \$76.6 million
13 for the critical vendor payments. We then decreased that
14 amount following discussions with the 2L HoldCo lenders to
15 \$65 million in an effort to reach compromise with them on the
16 terms of this order.

17 Another piece of that compromise which we agreed
18 to as an accommodation to the second lien and HoldCo lenders
19 was that we would only receive \$30 million of that bucket at
20 the first day hearing with the understanding that the company
21 would be able to obtain the rest of the relief, pursuant to a
22 second interim order if we needed to ultimately use the
23 remaining \$35 million under the interim cap.

24 We established a lengthy and detailed record at
25 the first day hearing of the need for the relief requested in

1 the motion on the time frame that we requested it. We did
2 not agree that the second lien and the Holdco lenders to hold
3 another hearing later to relitigate whether there was an
4 actual need to make these payments; the only question was the
5 time frame on which we needed to make them.

6 The answer is that we need to make those payments
7 now. As Your Honor noted, we need access to the rest of the
8 bucket tomorrow and we are worked diligently with the 2L
9 HoldCo lenders throughout the week, including up to the
10 moments prior to this last hearing to help them understand
11 the urgent need for the second piece for that \$65 million
12 bucket.

13 Shortly before the hearing, we reached an
14 agreement with the second lien and the HoldCo lenders on a
15 reservation of rights which we understand will resolve the
16 objection to our usage of \$31 million of the \$35 million in
17 the second interim bucket that we're requesting. That is an
18 amount that is not related to the American Freight entities,
19 which I'll return to in a moment. But the reservation of
20 rights that I'd like to read into the record is:

21 "Notwithstanding anything to the contrary in the
22 first interim order or the second interim order, the rights
23 of the debtors, the Ad Hoc Group of Freedom Lenders, and any
24 other party in interest under the Bankruptcy Code or
25 applicable non-bankruptcy law, including, with respect to

1 compliance with the first interim order or the second interim
2 order, are preserved to the fullest extent possible."

3 Your Honor, with respect to the \$4 million in the
4 second interim bucket that relates to American Freight, we
5 understand that the objection still stands from the second
6 lien HoldCo group. Those claims, I'd like to note, are
7 really to be paid to warehousemen and logistics providers
8 who, otherwise, are going to have a lien on inventory that
9 the debtors are trying to liquidate as part of the
10 liquidation of the American Freight company. If we can't
11 obtain a release of that property, then we can't liquidate
12 the assets of the company and we can't liquidate them,
13 importantly, on the timeline anticipated by our GOB sale
14 order, which anticipates that the assets will be liquidated
15 by December 31st. The longer we go past that date, the more
16 we'll incur in terms of administrative expenses, at the very
17 least.

18 As we understand it, as we stated, the reservation
19 of rights that I read into the record resolves the objection
20 for the purposes of the \$31 million of the 35, and so we'd
21 like to focusing the rest of our presentation today on the
22 balance of the bucket relating to American Freight, which we
23 do continue to need tomorrow and which we request that the
24 Court grant.

25 THE COURT: Okay.

1 MS. SINCLAIR: Before we dive deeper into the
2 reasons that the relief should be granted, I'd like to start
3 by quickly reviewing the relevant legal standards for
4 approving critical vendor relief. There are three bases for
5 the relief requested in the motion: Section 363(b) of the
6 Bankruptcy Code, which allows payment to prepetition
7 obligations where sound business purpose exists; Section
8 105(a) of the Bankruptcy Code, which allows the Court to
9 authorize payment of prepetition claims based on the doctrine
10 of necessity; and Rule 6003(b) of the Federal Rules of
11 Bankruptcy Procedure, which allow courts to grant interim
12 period if the debtors show that the relief is necessary to
13 avoid immediate and irreparable harm.

14 Taking each one and turn, the Court applies the
15 business judgment rule under Section 363(b) of the Bankruptcy
16 Code. In the context of first day relief, courts have
17 interpreted this to mean that the debtor must articulate some
18 business justification for making prepetition payments to
19 creditors and that the Court has broad flexibility to tailor
20 its orders to meet a wide variety of circumstances. That
21 language can be found, for example, in, In re Ionosphere
22 Clubs, 98 B.R. 174, which we have cited in our motion.

23 The concept is articulated more generally in
24 Delaware case law, as well; for example, in Smith v Van
25 Gorkom, 488 A.2d 858, the Supreme Court of Delaware stated

1 that the business judgment rule is a presumption. That in
2 making a business decision, the directors of a corporation
3 acted on an informed basis, in good faith, and in the honest
4 belief that the action was taken in the best interests of the
5 company.

6 Similarly, in Aronson v Lewis, 473 A.2d 805, the
7 Supreme Court of Delaware stated that absent an abuse of
8 discretion, a company's business judgment will be respected
9 by the courts, and went on to say that the burden is on the
10 party challenging that decision to establish facts rebutting
11 the presumption.

12 With respect to Section 105(a), the Court may
13 authorize the payment of prepetition obligations under the
14 doctrine of necessity. The United States Court of Appeals
15 for the Third Circuit recognized this doctrine in, In re
16 Lehigh and New England Railway Corporation, 657 F.2d 570, in
17 which the Third Circuit held that the Court could authorize
18 the payment of prepetition claims if the payment was
19 essential to the continued operations of the debtor. The
20 Court specifically noted that those payments are justified
21 where there is, quote, "a possibility that the creditor will
22 employ an immediate economic sanction failing such payment."

23 The Third Circuit, in, In re Penn Central
24 Transportation Company, 467 F.2d 100, made a payment -- made
25 a similar finding, holding that the doctrine of necessity

1 permits "immediate payment of claims of creditors where those
2 creditors will not supply services or material essential to
3 the conduct of the business until their pre-reorganization
4 claims have been paid."

5 And, finally, with respect to immediate and
6 irreparable harm, that term is not defined in Rule 6003, but
7 courts have found that it exists where the absence of relief
8 would impair a debtor's ability to reorganize or threaten the
9 debtor's future as a going concern, as stated, for example,
10 in, In re Ames Department Stores, Inc., 115 B.R. 34.

11 Your Honor, at the first day hearing, we offered a
12 substantial amount of evidence supporting the relief
13 requested in accordance with these legal standards. I'd like
14 to revisit, briefly, some of that evidence today in the
15 context of the request for the second interim bucket.

16 We first tendered a declaration from Mr. David
17 Orlofsky, the debtors' chief restructuring officer. In that
18 declaration, Mr. Orlofsky stated the following. In
19 paragraph 128, Mr. Orlofsky stated, quote:

20 "The debtors' critical goods and services
21 providers support nearly every aspect of the debtors'
22 business, including by storing the debtors' products,
23 shipping the debtors' products to their franchisees and
24 customers, and supplying their products and merchandise."

25 In paragraph 129, Mr. Orlofsky stated, quote:

1 "Moreover, with respect to each of the debtors'
2 businesses, the debtors obtained core products and
3 merchandise from a limited number of highly specialized
4 vendors that are irreplaceable, due to, among other things,
5 demand created by branding and marketing."

6 Continuing in paragraph 129, Mr. Orlofsky stated,
7 quote:

8 "The debtors failed to stop the products that
9 customers have grown accustomed to seeing in their stores and
10 across their e-commerce websites, the effects would extend
11 far beyond simply not offering those particular products. If
12 consumers become aware that the debtors do not stock a
13 particular item, they simply will not come to the debtors'
14 stores or visit their websites, where they may have purchased
15 additional items beyond the one product that they initially
16 came to purchase."

17 Mr. Orlofsky concludes in paragraph 129 by
18 stating, quote:

19 "I believe that if the debtors' critical goods and
20 services providers refused to continue doing business with
21 the debtors on account of outstanding prepetition amounts,
22 replacing them will cause significant delays in each debtor's
23 ability to deliver the necessary products to its stores,
24 franchisees, and customers during the rapidly approaching
25 holiday season, which would not only jeopardize, but also

1 cause irreparable and potentially irreversible damage to the
2 debtors' business and their estates."

3 Also Levitt to the American Freight piece of this
4 equation is Mr. Orlofsky's statement in paragraph 135 in
5 which he states, quote, "The debtors will realize an
6 immediate benefit in terms of financial liquidity upon the
7 sale of the store-closure assets and the termination of the
8 operations at those stores," both of those terms referring to
9 the American Freight stores.

10 At the first day hearing, you also heard evidence
11 through the live testimony of Mr. Orlofsky, both in his
12 cross-examination and his direct examination. During his
13 cross-examination, Mr. Orlofsky was asked by Mr. Shore of
14 White & Case:

15 "Question: When you say, "critical vendors," it's
16 your conclusion and your testimony to the Court that 99
17 percent of the prepetition, unsecured creditors of these
18 debtors are critical?

19 "Answer: No. You keep saying they're all
20 critical. There's a lot that is 503(b)(9), which is not
21 critical; that's just the way the Bankruptcy Code works;
22 that's number one.

23 Number two, when you deal with vendors, they don't
24 want to wait until the end of the case to know that they are
25 getting paid, particularly in retail. They want to know

1 today that they're getting their money so that they will keep
2 shipping to you and not put you on C.O.D. terms. The *quid*
3 *pro quo* for paying any of 503(b)(9)s or critical vendor
4 payments is that they get continued trade terms and they keep
5 shipping goods so that we have things in the stores to sell.
6 That's the critical component of this. That's why we try to
7 pay it early in the case so we keep the vendors happy to try
8 to minimize disruption."

9 That is from the November 5th, 2024, hearing
10 transcript, page 102, line 11, through page 103, line 20.

11 During his redirect examination, Mr. Orlofsky was
12 asked by Mr. Dugan of Willkie Farr:

13 "Question: You gave testimony in your declaration
14 and cross with respect to critical vendors. What is a
15 critical vendor?

16 "Answer: Critical vendors, and you have to
17 understand it in light of the types of businesses we have --
18 The Vitamin Shoppe buys very specialized products from very
19 specialized vendors there, so there are products that you
20 can't really get from other vendors that are hard to replace
21 and things like that. Things that would be, you know, again,
22 when you have specialized product and people want it, there
23 are only certain places you can get it from, so it disrupts
24 the flow of the customer experience. It disrupts sales that
25 you need to sell. And there are things that are kind of

1 unique or troubling; they are unique products or they are
2 'difficult to find' alternative sources from that
3 perspective.

4 "Question: Why is it important for the debtors to
5 pay their critical vendors within a reasonably short period
6 of time?

7 "Answer: Well, I mean, we have already had this
8 yesterday and we are having it every day we are here. We are
9 getting constant vendor calls about 'Where is my payment? If
10 I don't get paid...'

11 Because vendors understand 503(b)(9), they
12 understand critical vendors. Some of these vendors will been
13 through other restructurings before so they understand how
14 this works. If you don't pay them, they put you on hold and
15 they don't send you product. If you don't have product, it
16 becomes a natural impact. If you don't have product in
17 stores and if you sell things, people will stop coming to
18 your stores."

19 That testimony is from page 117, line 4, through
20 page 118, line 7, of the November 5th, 2024, hearing
21 transcript.

22 Mr. Orlofsky was further asked by Mr. Dugan:

23 "Question: So your understanding is as the chief
24 restructuring officer of the debtors, what do you reasonably
25 think would happen to the debtors if they were unable to keep

1 their critical vendors happy and pay them within a reasonable
2 period of time?

3 "Answer: I mean, it's bad for the business. It's
4 bad for the enterprise value. And if it goes on for too
5 long, you are kind of looking at more situations where you
6 have to potentially liquidate the business, as opposed to
7 reorganize the business, which, as unfortunately, we are
8 seeing with American Freight, is not a good place to be for
9 anybody."

10 That testimony is from page 118, lines 14
11 through 25, of the November 5th, 2024, hearing transcript.

12 The next day at the November 6th, 2024, hearing,
13 Mr. Orlofsky was further questioned by Mr. Dugan as follows:

14 "Question: Focusing on the 503(b)(9) vendors, why
15 is it important for the company to pay these vendors
16 relatively promptly?

17 "In retail, particularly, because we had the same
18 issue when I was at Party City, vendors in retail get very
19 sketchy with retailers that are in bankruptcy, even ones that
20 have plans to come out, because there's a long history of
21 big-name retailers and smaller-name retailers that actually
22 didn't make it and didn't survive a Chapter 11 and ultimately
23 converted. So it's an area of interest in many industries,
24 but I believe it's more high-profile or more of an urgent
25 nature for vendors in the retail space.

1 What they like to do is they want to get
2 their 503(b)(9) claims paid during the pendency of the case
3 and they want to know when they are going to be paid early.
4 And if they don't tend to know, they tend to put you on
5 things like C.O.D. or stop shipping, which, unfortunately, is
6 kind of what's happened over the last 72 hours since we filed
7 bankruptcy."

8 That testimony is from page 78, line 8, through
9 page 79, line 24, of the November 6th, 2024, hearing
10 transcript.

11 Mr. Orlofsky was further asked:

12 "Question: And what can be the consequences to be
13 business of having its vendors put on C.O.D. terms?

14 "Answer: Besides the trade contraction and the
15 potentially higher payment amount, it is also disruptive;
16 that is not the way companies like to operate. And it's
17 also, you know, some vendors won't even ship to you on
18 C.O.D.; some of them will just stop. They are not required
19 to keep shipping to you.

20 A lot of these vendors are on, you know, open to
21 buy, so there is not a commitment to buy; you just set a
22 price and buy the quantity that you," there's an
23 "indiscernible" end to that quote.

24 "Question: And in the situation where you have
25 vendors putting you on C.O.D. or not shipping, what effect is

1 there on the revenue of the business?

2 "Answer: If you do not have product in your
3 store, then, naturally --" there's an indiscernible quote --
4 "along in terms of lower sales to the business and less
5 repeat customers. When we try to talk about bankruptcy, we
6 try to make it as "business as usual" as possible.

7 If customers can come into the store and buy their
8 products and not notice any difference, they'll continue to
9 keep coming back. They tend not to come back if product is
10 not there. So if you don't have product, they tend not to
11 come back. You tend to lose them in sales and then,
12 ultimately, EBITDA, and then kind of falling through the
13 waterfall. Enterprise value will decline over time if you
14 can't arrest that slide."

15 That testimony is from page 80, line 9, through
16 page 81, line 14, of the November 6th, 2024, hearing
17 transcript.

18 Finally, Mr. Orlofsky was asked:

19 "Question: How many of your critical vendors have
20 put holds on to your knowledge?

21 "Answer: I don't have the exact number, but I
22 would say a good proportion. Probably more than half.

23 "Question: And what is that doing to the debtors'
24 business right now?

25 "Answer: Right now, we are kind of at a

1 standstill. We can't order new products. And if we can't
2 get new product in the door, we can't sell it.

3 "Question: Are the debtors sustaining injury
4 right now?

5 "Answer: We are."

6 Let's look at where we are today in light of the
7 legal standards and the evidence elicited through
8 Mr. Orlofsky. Unsurprisingly, Your Honor, we ended up
9 needing the rest of our interim critical vendor bucket.
10 We've utilized the original \$30 million and we will not be
11 able to honor critical vendor payments this week without
12 access to the balance of that cap by tomorrow, at the latest.

13 It was not a surprise to us that we would need
14 these funds because the company, in its business judgment,
15 had sized the interim cap for the relief that it believed was
16 necessary during the interim period.

17 We informed our lenders over a week ago, last
18 Wednesday, November 13th, that we would need access to the
19 interim bucket. The Freedom Lenders have since asked for a
20 variety of information regarding the claims in the bucket.
21 We have answered their questions about the exact creditors
22 receiving the payments, the size of those payments, and why
23 making those payments is necessary. We have sent examples of
24 trade agreements and letters sent to the vendor community.
25 We had a phone call on Monday of this week, where

1 Mr. Orlofsky answered detailed questions from White & Case
2 regarding the vendor payments. We've also complied with our
3 obligation to provide critical vendor reporting, which shows
4 that we have utilized the \$30 million bucket as of last week.

5 As I noted a few minutes ago, we understand that
6 their objection, with respect to those non-American Freight
7 payments is now resolved for purposes of the second interim
8 order by virtue of their reservation of rights.

9 On the American Freight front, which remains
10 unresolved, the Freedom Lenders asked earlier this week for
11 a, quote, "profitability analysis" regarding any creditors of
12 American Freight who are being paid under the critical vendor
13 order; in other words, they would like to know how much
14 profit the debtors will make from a liquidation by paying
15 certain critical vendors of American Freight.

16 We've been working on that analysis. We've agreed
17 to provide it and since this morning, we've made enough
18 progress on that analysis that AlixPartners was able to share
19 it with the lenders' advisors in advance of this hearing. It
20 remains subject to discussion, but the conclusion is that
21 double-digit millions of dollars in revenue are protected by
22 the cash outlay in the vendor bucket associated with American
23 Freight, which is \$4 million.

24 We understand that the lenders are reviewing the
25 document, but nonetheless, the none of our efforts have

1 resulted in the 2L HoldCo lenders agreeing to this relief;
2 instead, they simply sent more information requests. Among
3 other things, they asked us on Tuesday morning of this week
4 for evidence showing every delivery covered within
5 the 503(b)(9) period was made in connection with, and I
6 quote:

7 "The vendor's standard terms of service and
8 contractually defined deliveries, including the contracts
9 and/or terms of service that set forth such payment terms,
10 payment deadlines, and delivery dates and any oral or written
11 modifications made thereto in the three months prior to the
12 bankruptcy filing."

13 Well, on that same day, they asked for an
14 accounting of every payment the debtors made within the 90
15 days prior to the bankruptcy filing and all contractual terms
16 governing those payments, including any written or oral
17 modification to those contracts within the 90 days pre-
18 bankruptcy; information that far exceeds the scope of the
19 relief being requested in the critical vendor motion.

20 Your Honor, this is not the level of detail that
21 is required to obtain interim critical vendor relief. It is
22 justified by business judgment and the doctrine of necessity,
23 on which we've established a robust record, particularly
24 through the evidence attested to by Mr. Orlofsky. More
25 importantly, this is Freedom Lenders' effort to substitute

1 their business judgment for that of the company, which is
2 entitled to deference under applicable bankruptcy law and
3 Delaware law and, particularly, here because the 2L HoldCo
4 lenders have not shown any evidence to rebut the presumption
5 that the debtors' business judgment should be respected.

6 They are attempting to establish a new standard of
7 what "business judgment" means and based on all of the
8 information requests we've been responding to, we have
9 constantly moving goalposts that they're trying to make the
10 debtors meet, including, now evaluating whether the
11 profitability analysis we're providing shows that we are
12 profitable enough from American Freight's liquidation, again,
13 in their judgment, when, in the company's business judgment,
14 we have already established that the best way to maximize the
15 value of that asset is to liquidate it in accordance with the
16 already-approved GOB procedures and pay the warehousemen and
17 distribution centers the amounts necessary to release and
18 then actually liquidate those assets.

19 Our business judgment, Your Honor, has been, and
20 remains that we need access to the balance of the interim cap
21 tomorrow, the full \$35 million. We cannot afford further
22 instability of this business or any delay in the liquidation
23 of American Freight, which is supposed to be finished by
24 December 31 of this year to maximize the value of that
25 company.

1 Delay and not allowing us access to the box is
2 detrimental to every stakeholder, including the 2L HoldCo
3 lenders, and we'd ask that Your Honor enter the second
4 interim order today for that reason. Thank you.

5 THE COURT: Thank you.

6 THE COURT: Thank you.

7 Mr. Shore.

8 MR. SHORE: Thank you, Your Honor. Chris Shore
9 from White & Case on behalf of the HoldCo and 2L Claimants.

10 I would also like to talk briefly about where we
11 have been, confirm where we are right now and then focus my
12 presentation on American Freight which is the open issue.
13 Again, American Freight, an entity that is going to be
14 liquidated by the end of the year. Then at the end, just so
15 I don't forget, I would like to take a minute to get some
16 clarification on scheduling.

17 Point one, where have we been since the first day
18 hearings ended. You got a long recitation of what the
19 testimony was. I hope Your Honor will also recall, at the
20 end of the second day of the first days, when talking about
21 critical vendors, Mr. Orlofsky testified that he was
22 uncertain about the breakdown of payments being sought to
23 make under the critical vendor order including a debtor-by-
24 debtor breakdown, particularly what pertained to American
25 Freight, and how much was critical vendor, how much

1 was 503(b)(9), how much was lien claimant because it had all
2 been subsumed under one motion and one order.

3 Ultimately, he said, and this is from the
4 November 5th transcript at 92, "I don't have the exact
5 amounts but at some point, we can share with you."
6 Notwithstanding his lack of precision, the debtors were clear
7 in their motion about why they wanted authority to pay those
8 amounts and in addition to what Ms. Sinclair put on the
9 record about what was in the testimony, the motion, at
10 Paragraph 9, "The debtors businesses depend on the
11 uninterrupted flow of inventory and other goods through their
12 distribution networks."

13 Paragraph 10, "If consumers become aware that the
14 debtors do not stock a particular item, they will simply not
15 come to the debtor stores or visit their websites."
16 Paragraph 10, again, "If the debtors critical goods and
17 services providers refuse to continue to do business on
18 account of outstanding prepetition amounts, replacing them
19 would cause significant delays in..."

20 I could go on and on. All of that has to do with
21 an operating debtor who has customers, who would have to
22 replace a vendor, who needs more inventory to sell to
23 generate profits to get more inventory. None of that has
24 anything to do with American Freight. In fact, Ms. Sinclair
25 cited from that long recitation of the evidence, I counted

1 one statement by Mr. Orlofsky having anything to do with
2 American Freight.

3 As you may recall or as I said, he said he would
4 be sharing that information. The Court entered the first
5 interim order on the 6th. We got the first report on the
6 11th showing almost no spend. That was great, but then on
7 November 13th Betsy Feldman from Willkie called Andrew Zatz,
8 my partner, to say the debtors want to tap the additional \$30
9 million and it needs to be consented to in a week, otherwise
10 you are going to have to object because our funding will run
11 out tomorrow. Mr. Zatz responded immediately, "Please get us
12 the vendor-by-vendor and debtor-by-debtor list."

13 Later that night, Ms. Feldman sent the off the
14 shelf reports, a new form of order, and a message that we are
15 going to have to go to Court. In the meantime, Alix is
16 working on that analysis. Okay, Mr. Zatz, the next morning,
17 the 14th, "Can we please have a call." On the 17th we get
18 the Alix spreadsheet, we say, great, let's hop on the phone.
19 On the 18th we have a call that Ms. Sinclair was just talking
20 about including Mr. Orlofsky.

21 Two things came out of that call. It appeared to
22 us that the debtors were looking to write checks for vendors
23 of the operating debtors no matter what. If you are a trade
24 creditor of a debtor we will stroke you a check. Two, the
25 debtors wanted to use money under the order to "make more

1 profit" in their liquidation of American Freight.

2 As to this first part, in most cases there is
3 always an air in critical vendor. Your Honor, we would like
4 the maximum amount possible. We are not being asked to -- we
5 are not being ordered to pay this money, we want a pool of
6 assets from which we can go out to our vendor community and
7 convince them to work with us post-petition. We have a DIP in
8 place, we have money, we can pay you some of your prepetition
9 claim. The whole point of doing that exercise, getting as
10 much money as possible, but not being ordered to spend it is
11 to really determine in the market how much does management
12 really need to pay of prepetition unsecured claims
13 or 503(b)(9) admin claims in order to get people to do
14 business post-petition.

15 There should be, I think everyone will say, an eye
16 towards paying as little as possible of the prepetition
17 claims to continue the virtuous cycle of taking an inventory,
18 converting it into cash, buying more inventory, and
19 preserving distributable value for all creditors, not just a
20 few creditors. So, when we got the first interim report that
21 looked good. You got all this authorization, you have spent
22 very little of it.

23 The November 13th call buried that. The
24 November 18th call even worse because far from the debtors
25 trying to make any effort to talk to their vendors and say I

1 don't want to pay you your prepetition claim, I am not paying
2 any of my other prepetition claims, will you do business with
3 me, Mr. Orlofsky made it clear that he wasn't trying to save
4 what he called "every shekel." He wanted to make sure that
5 as soon as they got to an agreed amount of a prepetition
6 claim, that is the debtors books say this, do you agree with
7 this, a check was getting cut. It was a two-step process, how
8 much money do we owe you, here comes the check.

9 It is also clear that that process was being done
10 based solely on Alix's and management's view that the
11 creditor was being covered by the order. That is they were
12 looking at trade and saying we want a delivery from you post-
13 petition we will pay your prepetition claim, we just want
14 terms. So, imagine that, Vitamin Shop has a vendor with a
15 \$40,000 prepetition unsecured claim and \$20,000 of that is
16 a 503(b)(9) claim.

17 What the debtors have been doing under the order
18 is, in order to get the next \$20,000 shipment, paying \$40,000
19 without regard to whether or not they could pay less than
20 \$40,000 and having to, because the way the company's money
21 works right now, borrow DIP money to do that transaction.
22 That 15 percent interest and, effectively, priming everybody
23 else in the capital structure.

24 That didn't seem right to us, that didn't seem
25 fair to us but to be clear, we are not trying to stop the

1 business. As Mr. Lauria said, as I will say to you, we
2 understand critical vendors, we are not fighting the doctrine
3 of necessity but there has to be some guardrails. So, what
4 we have resolved through this is to say, look, we are not
5 trying to get in the way of your spending the money,
6 Mr. Orlofsky, but if what is happening here is you are
7 taking 503(b)(9) money and paying it to someone who delivered
8 services to the debtors or delivered goods 30 days prior to
9 petition, we are going to have to unwind that because the
10 vibe we were getting on the call was there was no governance
11 going on.

12 So, we put the reservation in place and that's
13 done. The reason we asked for all the backup is now the
14 debtors know what we want. When we get to the point of
15 having to go through what was done on a post basis we are
16 going to need -- someone is going to need to, whether it's
17 the committee, or the 2Ls or the HoldCo lenders or somebody
18 is going to be looking at that stuff. They now have a
19 document hold in place on that, they know what people want,
20 they know what tracking needs to be done.

21 So, we resolved everything having to do with the
22 operating business. The other thing that came up, and that
23 was between the time of the November 18th call and now, we
24 reached out to them to see if we could settle this, we just
25 got to the settlement now. Operating business, fine. What

1 about American Freight, it is not an insignificant amount of
2 money they are seeking now or later and certainly worth
3 dealing with today particularly for someone who is being told
4 they are getting zero under the plan. Don't forget the 2L
5 lenders have a lien on the inventory and the cash that the
6 debtors are seeking authority to spend here. The debtors
7 are, by virtue of this order and the DIP order converting
8 unsecured prepetition claims at American Freight into priming
9 DIP claims at 15 percent interest.

10 So, what about this profit. I think what people
11 are talking about is if we pay to bring inventory in, borrow
12 money to pay to bring inventory in we can profit. We had a
13 problem with that concept and were very up front about it on
14 that call and have been over the last few days. The problem
15 we have is that Your Honor has no record in this concept of
16 profit making to support a finding of irreparable harm as
17 required by Rule 6003.

18 Simply, the failure to earn more profits is not
19 irreparable harm. We are not shutting down. You haven't
20 heard anybody even proffer that you are going to have to shut
21 down the liquidation or anything else. There are just going
22 to be some goods that are not taken in, and not sold, and
23 therefore won't earn more "profit."

24 Three points on that. The motion doesn't even
25 contend that the failure to earn profit is irreparable harm.

1 Each of the sections, all of this testimony that got cited to
2 you is all about operating businesses. What we are talking
3 about here is that the money that would come in, if that
4 inventory sold, is not part of a virtuous circle. It's not
5 getting reinvested, it's not bringing in new customers. It's
6 not creating a need to go out and find new suppliers. And
7 Mr. Orlofsky is not here to explain why borrowing DIP money
8 at 15 percent to pay down -- to do this when all we are doing
9 is paying down an ABL at SOFR plus two. And it makes even
10 less economic sense when in order to do that transaction you
11 have to roll up every dollar borrowed by one to one.

12 Second, the debtors have cited no authority for
13 their view. I get it on the doctrine of necessity. I disagree
14 that 363(b) authorizes management, in their business
15 judgment, to pay prepetition claims and Rule 6003 has nothing
16 to do with it but I am not, as I said, fighting the doctrine
17 of necessity. This is the doctrine of profit making that
18 they are talking about and it's a bad rule.

19 Why wouldn't you just argue that if we are
20 authorized to pay all of our prepetition unsecured creditors
21 on day 1, we don't need an unsecured creditors committee.
22 That would save money, it would streamline the plan process,
23 we could all figure out ways in which distributable value
24 might be increased by doing that, but that is not how the
25 code works. The code is the code is the code and it has to

1 stop somewhere. They can't take, under the doctrine of
2 necessity, borrow DIP money, and use it to make more profits
3 for the DIP lender by paying off prepetition claims.

4 Part three, you have no record of a profit here.
5 I will give you an example: if a creditor has a \$40,000
6 prepetition unsecured claim, \$20,000 is 503(b)(9), and
7 \$20,000 in order to get the new goods in. The debtors want to
8 borrow the money to pay 15 percent on that for a 503(b)(9)
9 claim that isn't certain to be paid. Again, they want to
10 prepay and admin claim that only has to be paid in the event
11 of a Chapter 11 plan, prepaid in cash. We have no idea where
12 American Freight is going to go after its all liquidated.

13 They want to pay a GUC claim there that will never
14 be paid under any plan. In order for American Freight,
15 general unsecured creditor, to get a distribution outside of
16 this critical vendor order you would have to pay off the DIP,
17 the ABL, the 1L and the 2L, all which exist in that box, and
18 then you have to pay 15 percent interest on it all.

19 So, I asked for the profitability analysis, we got
20 it. I got it in my inbox 15 minutes ago. We may get there
21 with them, they may be able to convince us, but Your Honor
22 doesn't have a profitability analysis for you and, again,
23 even if they came in and said we will make a million dollars
24 of profit in the face of an objection, especially since we
25 are still in the 21 days since the petition date, there needs

1 to be an evidentiary showing of irreparable harm. There has
2 not been an evidentiary showing of irreparable harm at least
3 as it pertains to American Freight.

4 Failure to earn profits, more profits, is not
5 irreparable harm. So, we would ask the Court to deny that
6 aspect of the order, again, without prejudice to their trying
7 to come back and do it at a later time but this is not a
8 record from which the Court can conclude that that money has
9 to go out now.

10 THE COURT: All right. Just -- I am going to get
11 to you, Mr. Sandler, hold on a second. My other hearing that
12 started this afternoon is not done. So, I have got a room
13 full of lawyers who are waiting to restart that hearing. So,
14 I need to move this along.

15 Mr. Sandler, I know you have been, I guess,
16 retained five minutes ago to represent the committee but go
17 ahead.

18 MR. SANDLER: That is about right, Your Honor.
19 For the record Brad Sandler, Pachulski Stang Ziehl & Jones,
20 on behalf of the newly formed committee.

21 Your Honor, we joined this dysfunctional party, I
22 guess, about maybe two to three hours ago after the committee
23 selected Pachulski as its counsel, interviewed financial
24 advisors, and selected Province roughly maybe two hours ago
25 at this point. You know, obviously, we are drinking from a

1 fire hose, we are getting up to speed.

2 We learned about this hearing probably about maybe
3 two hours ago or so. As soon as Province was brought up to
4 speed or was selected by the committee, they reached out to
5 AlixPartners, they spoke with Mr. Orlofsky. They reported to
6 me that they agree with Mr. Orlofsky's assessment here.
7 Obviously, Ms. Sinclair's excellent presentation and the
8 prior evidence and the declaration is already in evidence.
9 It supports the payment of the \$4 million to the American
10 Freight vendors. This is relatively small dollars, Your
11 Honor, and the committee is going to defer in this instance
12 under the current facts to the debtors' business judgment for
13 the \$4 million. We support the relief.

14 So, with that, Your Honor, I am going to stand
15 down but there is a lot of work that the committee has to do
16 here. We understand the dynamics, I will say. I think they
17 are fairly transparent with the various parties. We expect
18 to be extremely active in these cases in due course. Thank
19 you, Your Honor.

20 THE COURT: Thank you, Mr. Sandler.

21 Ms. Sinclair, one question. You indicated that
22 these are -- that the \$4 million is going to warehousemen and
23 distribution centers. I assume this is for product that
24 American Freight already purchased and its sitting in a
25 warehouse or distribution center, and the debtors want to

1 liquidate American Freight in order to maximize value. So,
2 how is the value going to be impacted if this -- if the \$4
3 million is not granted today but is granted a week or two?

4 MS. SINCLAIR: The issue, as I understand it, Your
5 Honor, is that the longer it takes for us to liquidate this
6 collateral the more expensive it becomes for us to do so in
7 the form of ongoing administrative expenses and the less
8 price we may be able to ultimately achieve for those assets
9 in the sense that we may need to more deeply discount them
10 with more and more time. So, each day that passes is
11 incrementally more important to us in that regard.

12 THE COURT: Okay. I am going to grant the motion.
13 I think, as Mr. Sandler pointed out, relatively speaking the
14 dollars we are talking about are small in this case, in
15 connection with this case. I think the debtors have shown
16 that there will be some harm to the debtors, probably
17 irreparable harm, if they have to spend additional funds to
18 or if they have products sitting in a warehouse that they
19 can't liquidate and it becomes more expensive to liquidate it
20 as the process goes along. Those are dollars that aren't
21 going to be recovered.

22 It seems to me that in their business judgment
23 they have determined that if we spend this \$4 million to get
24 that product released, we can sell it and we can make more
25 money, and it goes to that profitability argument. If they

1 made that conclusion then I think the doctrine of necessity
2 has been met. These aren't continued operations, obviously,
3 in the sense of its an ongoing business but its continued
4 operations in the sense that they are trying to liquidate
5 this debtor in order to maximize value for all creditors.
6 So, for those reasons I am going to grant the motion.

7 Do we have a form of order uploaded or filed?

8 MR. MORTON: Your Honor, good evening. Ed Morton
9 from Young Conaway.

10 I believe we are able to upload the form of order
11 now. There was an ongoing dialog during the hearing where
12 all the other points that we were trading back and forth with
13 White & Case on are resolved. I think it's just the exclusion
14 of their suggested prohibition on American Freight payments.
15 So, I think we should be able to have that filed under
16 certification of counsel and uploaded before you are done
17 with your other hearing.

18 THE COURT: Thank you.

19 Anything else before we adjourn?

20 MR. SHORE: One last thing, Your Honor. We
21 discussed with the debtors the calendaring of our motion in
22 the HoldCo case that was filed the other night. They have
23 agreed that it can go on for the 10th. We just got to agree
24 with them on an objection deadline which we probably just
25 default to the rules since it's a 21-day motion, if that is

1 all right with Your Honor. Then we are still trying to work
2 through the depo of the CEO. We are trying to work around
3 his vacation. So, I hope we can work that out but if not, we
4 will -- I don't know, I am not quite sure how we are going to
5 handle it. Is Your Honor going to be unavailable next week
6 entirely?

7 THE COURT: That is correct but we do have a duty
8 judge if you need to. I did speak with Judge Owens who is a
9 duty judge and she said she is available if necessary to deal
10 with any discovery disputes or scheduling disputes.

11 MR. SHORE: Very good, Your Honor. With that we
12 wish you the best of luck on your procedure and a happy
13 thanksgiving to everybody, I guess, right.

14 THE COURT: Thank you. Same to everybody from me.
15 We are adjourned. Thank you.

16 (Proceedings concluded at 5:23 p.m.)
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CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ William J. Garling

November 6, 2024

William J. Garling, CET-543

Certified Court Transcriptionist

For Reliable

/s/ Mary Zajackowski

November 22, 2024

Mary Zajackowski, CET-531

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